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1st Session

SENATE

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NOMINATION OF MARTHA ROMAYNE SEGER TO BE A MEMBER OF THE BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM

REPORT

OF THE

COMMITTEE ON BANKING, HOUSING, AND URBAN AFFAIRS UNITED STATES SENATE

together with

ADDITIONAL VIEWS

MAY 24 (legislative day, APRIL 15), 1985.—Ordered to be printed

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MAY 24, 1985.—Ordered to be printed

Mr. GARN, from the Committee on Banking, Housing, and Urban Affairs, submitted the following

REPORT

together with

ADDITIONAL VIEWS

The Committee on Banking, Housing, and Urban Affairs, to which was referred the nomination of Martha R. Seger to be a member of the Board of Governors of the Federal Reserve System, having considered the same, reports favorably thereon and recommends that the nomination be confirmed.

COMMITTEE ACTION

The nomination of Martha R. Seger to be a member of the Board of Governors of the Federal Reserve System was resubmitted to the Senate by President Reagan on January 3, 1985, and was referred to the Committee on the same day. Governor Seger testified before the Committee on March 27, 1985.

At its meeting on May 21, 1985, the Committee voted 11 to 4 to report the Seger nomination favorably to the Senate. Senators who voted in favor were: Garn, Heinz, Armstrong, D'Amato, Gorton, Mattingly, Hecht, Gramm, Riegle, Dodd, and Dixon. Senators voting against the nomination were: Proxmire, Cranston, Sarbanes, and Sasser.

COMMITTEE COMMENTS

On June 28, 1984, President Reagan nominated Dr. Martha R. Seger to be a member of the Board of Governors of the Federal Reserve System. Four days of hearings were held that month, and on

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June 28, 1984, the Committee favorably reported the nomination to the Senate. Dr. Seger's qualifications to be a member of the Board of Govenrors are discussed in detail in Executive Report 98-39. Briefly, she has had extensive experiences as a State bank regulator, a member of the staff of the Federal Reserve, a commercial bank economist and executive, and as a professor, lecturer, and consultant dealing with issues of economics and banking. Since her recess appointment, she has served capably and well as a member of the Federal Reserve System.

The Senate adjourned for a summer intra-sessional recess beginning on June 29, 1984 and ending July 23, 1984. On July 2, 1984, President Reagan issued a recess appointment to Dr. Sager. The recess appointment expires at the end of the 1st session of the 99th Congress, which will probably occur late in 1985.

THE RECESS APPOINTMENT

The Constitution of the United States, Article II, Section 2, Clause 3 authorizes the President to "fill up all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session". Similarly, by statute the President is authorized to "fill up all vacancies that may happen on the Board of Governors of the Federal Reserve System during the recess of the Senate by granting commissions which shall expire with the next session of the Senate". 12 U.S.C. 245.

When a vacancy "happens"

The Constitution empowers the President to "fill up vacancies *that may happen during the recess of the Senate".* Some have insisted that this vacancy did not "happen" during the July recess, but back in February 1984 when Governor Teeters left.

One hundred years ago the issue of when a vacancy "happened" was a very controversial question, with many arguing that the vacancy must literally occur during the recess. However, this position has been firmly rejected. The well-established interpretation of the constitutional phrase "happen to exist" is that whenever reason, if the vacancy still continues after the Senate has ceased to sit the President may fill it by recess appointment. A string of judicial opinions starting in 1880 (*In Re Farrow,* 3 Fed. 112 N.D. Ga. 1880) and a long line of unanimous Attorney General opinions support this current interpretation of the law. The Comptroller General issued a report in 1948 also supporting this interpretation, noting that very rarely does it occur that a vacancy "happens" during a recess—invariably a vacancy occurs, as the Seger vacancy occurred, while the Congress is in session.

Congress itself implicitly accepted this interpretation of Presidential recess authority when it enacted prohibitions on the payment of salaries of certain recess appointees until they are confirmed by the Senate. This legislation's prohibitions, however, do not apply to "nominations for the office which were pending at the end of the session". 5 U.S.C. 5503 (a)(1)-(3). Nominations pending at the end of the session may become, as Congress recognized, recess appointees because the vacancy "happens" during the recess.

Intra-sessional recesses

For many years, the constitutional recess authority was construed to apply only to the period following final adjournment of the Congress for the session, and before the next session began. However, starting with a 1921 Attorney General opinion, this authority has been interpreted to include lenghty adjournments during a session. Consequently, the periods August 24, 1921 to September 21, 1921 (29 days); July 3, 1960 to August 8, 1960 (36 days) and August 2, 1979 to September 4, 1979 (33 days); have been seen as recesses where appointments could be made.[1] In the recent past, Presidents Nixon, Carter and Reagan made numerous intrasession recess appointments, as follows:

Intra-session recess appointees by President Nixon:

October 14, 1970—November 16, 1970 (31 days): 6 appointments.
June 30, 1972—July 17, 1972 (16 days): 1 appointment.

Intra-session recess appointees by President Carter:

August 3, 1979—September 5, 1979 (31 days): 1 appointment.
October 2, 1980—November 12, 1980 (39 days): 16 appointments.

Intra-session recess appointees by President Reagan:

August 3, 1981—September 9, 1981 (35 days): 4 appointments.
August 20, 1982—September 8, 1982 (18 days): 1 appointment.
October 2, 1982—November 29, 1982 (56 days): 13 appointments.
January 3, 1983—January 25, 1983 (20 days): 4 appointments.
August 4, 1983—September 12, 1983 (39 days): 4 appointments.
June 29, 1984—July 23, 1984 (23 days): 12 appointments.

The length of a "recess" for constitutional purposes

Dr. Seger's recess appointment was made during a 23 day intrasession recess, and some have contended that this period of time is not a long enough "recess" for constitutional purposes. Existing constitutional interpretation suggests that recesses must be, at a minimum, longer than two to ten days. As suggested above, a 29 day period was considered to be a sufficiently lengthy recess for constitutional purposes.

In 1904, President Theodore Roosevelt attempted to make 168 appointments in a "one second recess". The Senate officially adjourned the second session, and immediately began a Special Session of Congress. The President asserted the right to appoint during this "constructive recess".

The Senate instructed the Judiciary Committee to examine the "constructive recess". The Judiciary, in a report which was adopted and cited by later Attorney General opinions, rejected the "constructive recess" notion and defined a recess as—

> the period of time when the Senate is *not sitting in regular or extraordinary session as a branch of the Congress, or in extraordinary session for the discharge of executive functions,* when its members owe no duty of attendance; when

[1] 33 Op. A. G. 20 (1921); 41 Op. A. G. 463 (1960); 1979 Opinions of Office of Legal Counsel 314 (Aug. 3, 1979).

> its Chamber is empty; when, because of its absence, it can not receive communications from the President or participate as a body in making appointments. S. Report No. 4389, 58th Cong., 3d Sess. 2 (1905) (emphasis in original).

Subsequent Attorney General opinions elaborated on this definition, recognizing that the recess term had to be given practical construction, and doubting whether recesses of two or even ten days would constitute a recess for constitutional purposes. Consequently, a recent CRS report on the Seger recess appointment concluded:

> * * * the question whether a recess is one of sufficient duration during which a recess appointment can be made is unresolved by the courts and executive branch legal officers. Available authority would seem to case doubt on the legitimacy of appointments during very short recesses. Where to draw the line, however, is problematic and definitive resolution of that question must await litigation. ("Legal Issues Raised by Recess Appointment to Board of Governors of the Federal Reserve System", Richard Ehlke, Specialist in American Public Law, American Law Division, Congressional Research Service, July 12, 1984.)

The issue of whether a 23 day intra-sessional recess appointment is a lengthy enough "recess" has not been litigated. Most of the existing legal authority on the question is contained in Attorney General opinions. These opinions have indicated that recesses need to be longer than ten days, and in specific cases have approved of recess appointments of 29, 33 and 36 days. Because the 23 day recess was far beyond the ten day minimum, the President was well within his constitutional and statutory prerogatives in making the Seger recess appointment.

ADDITIONAL VIEWS OF SENATORS PROXMIRE, CRANSTON, SARBANES, AND SASSER

We are opposed to the nomination of Martha Seger to the Federal Reserve Board for two reasons:

(1) She does not have the basic qualifications normally expected of a Federal Reserve Board Governor; and

(2) Approval of her nomination could be construed as an endorsement of the President's abusive use of his recess appointment authority.

I. LACK OF QUALIFICATIONS

A. The special importance of the Federal Reserve Board

Congress established the Federal Reserve System in 1913 as an independent agency of government, accountable to Congress under the "money power" granted to Congress in Article I of the Constitution. At that time, Congress recognized, from the troubled history of central banking in the United States, the unique importance and the difficulties of the step it was taking. It was the intent of Congress to design an institution that would meet and consistently uphold the most rigorous standards of professional integrity and competence, and commitment to the public interest.

Consistent with this objective, Congress recognized the special necessity of selecting persons of the highest caliber to serve on the Federal Reserve Board. The Federal Reserve Act accordingly provided for Presidential appointment and Senate confirmation of Board members. It establishd a long—14 years—to assure independence of those members from the short-term political interests of the executive branch and from the pecuniary interests of the Federal Reserve System's member banks.

The central role of the Federal Reserve Board has never been more critical than it is today. U.S. and world financial markets are in turmoil. U.S. deficits are taking our Nation into uncharted financial waters. Debt crises in Latin America and elsewhere demand a high order of skill, initiative and dedication if they are to be dealt with effectively. Rapid financial innovation places new and increasingly complex demands on the Federal Reserve's regulatory acumen. Consumers, faced on all sides by new financial institutions, new financial instruments, new investment opportunities and new risks, must be able to look to the Federal Reserve and other regulatory agencies for assurance that the integrity of financial services at the retail level will not be weakened. The runs on non-federally insured thrift institutions has raised questions about the strength of the U.S. banking system.

It is in the face of these extraordinary circumstances that the Senate Banking Committee has the special responsibility to evalu-

ate the nomination of Ms. Martha Segar to one of the seven positions on the Fedeal Reserve Board.

B. Qualifications required for the Federal Reserve Board

Membership on the Federal Reserve Board remains one of the most complex and important assignments in our government. It requires an exacting analytical mind. It requires independence of judgment. It requires integrity. And it requires a strong sense of public service.

The present members of the Federal Reserve Board meet these qualifications. Those with academic backgrounds have made distinguished published contributions in their fields. Those who rose through business, banking, government or the Federal Reserve itself had established reputations for excellence before their nominations to the Board. While several members of the Board have had partisan affiliations, none were appointed for partisan reasons. All are known for independence of judgment and personal devotion to the highest standards of objectivity.

In addition to these personal characteristics, which should be mandatory for any nominee to so important a post, the Senate has in recent years sought to require a degree of balance in geographic origin and professional background on the Federal Reserve Board.

The Senate has repeatedly urged the President to respect the requirement of the Federal Reserve Act that there be "due regard for the fair representation of the financial, agricultural, industrial, and commercial interests, and geographic divisions of the country." On May 15, 1980, the Senate passed a resolution which read as follows: "Resolved, continued insensitivity to the requirements of the Federal Reserve Act in selecting nominees to the Federal Reserve Board shall not be overlooked by the Senate Committee on Banking, Housing, and Urban Affairs, or by the United States Senate."

It is the stated position of the Senate that the professional background of members of the Federal Reserve Board should be broadened to include members with direct personal experience with, and sympathy for, the problems of those economic activities, particularly agriculture and small business, which are most dependent on credit finance. In March 1984, the Senate specifically requested that the President name, to the next vacancy on the Federal Reserve Board, a person of demonstrable experience in small business or agriculture. The Senate approved a resolution to this effect by a vote of 50 to 37.

Several members of this Committee, including Senators Armstrong, Mattingly, Dixon, Dodd, Riegle, Sarbanes, and Sasser, went on record in support of this measure.

And Chairman Garn himself has noted that he would oppose and stop nominations that did not adhere to the notion that there be geographical and professional balance on the Federal Reserve Board.

C. 1984 nomination hearings

At the time of her nomination to the Federal Reserve Board last year, Ms. Martha Romayne Seger was largely unknown to this Committee, to the Senate, to the economics profession, to the financial community outside the State of Michigan, and to the public at

large. This was true with respect to her views, her qualifications and her experience.

It is especially pertinent in Ms. Seger's case that there was no written record of her views on economic and monetary matters. during her first nomination hearing the nominee was unable to provide the Committee with a single piece of writing, whether scholarly or popular in nature, on any financial, economic or monetary topic.

Accordingly, the 1984 hearings in the Senate Banking Committee on Ms. Seger's nomination were of unusual importance. The Committee held 14 hours of hearings over 4 days to explore the nominee's views, qualifications, experience, and competence to serve on the Federal Reserve Board. This extensive and searching inquiry was necessary, first, because Ms. Seger has no written record of established reputation in her field and second, because in the course of the hearings, the nominee revealed an extraordinary reluctance to give Committee members a clear statement of her positions.

The nominee did not present an opening statement. She declined to have her views on economic issues characterized in any particular way: for example, as a monetarist, supplyside, or Keynesian. She pled ignorance on a wide range of important technical issues on which she might reasonably have been expected to have a view. She declined to specify her position on important current policy debates, such as that between CEA Chairman Feldstein and Treasury Secretary Regan over the relationship of deficits and interest rates. She appeared to hold no firm views on a program for deficit reduction. She declined to identify deficit reduction as the most important economic challenge we face, or to specify whether, in her view, inflation would be better fought by deficit reduction or monetary tightness. She had no view on the size of the "structural deficit" or the lowest feasible non-inflationary rate of unemployment, or what rate of price inflation ought to be considered serious. She could think of no alternatives to the tight monetary policies which helped bring on the recession of 1981. In short, in instance after instance, the nominee confined her responses to the banal, the tautological, and the evasive.

It is impossible to convey, without lengthy quotation, the arduous character of Ms. Seger's confirmation hearing. The very length of the interrogation bears witness to the difficulty of obtaining a clear, straightforward statement of views from the witness. Perusal of the transcript confirms this impression, and we urge our colleagues to review the transcripts for themselves.

Ms. Seger's performance at her hearing led eight Senators on the Banking Committee to vote against her confirmation, which was approved by a vote of only 10 to 8. Senator Cranston summed up the view of the eight in the following way:

> Dr. Seger, during extensive hearings, has made statements supporting almost every side of the issues she has been questioned on. Indeed, she appears to have no grounded philosophy of her own. In these troubling times, we need persons on the Fed who are seasoned, independent thinkers who can bring some new ideas to the table. Dr. Seger does not fit that description.

D. 1985 nomination hearings

Since her first nomination hearing in June of 1984, nothing has occurred to contradict her lackluster performance. Indeed, the judgment of those who voted against Ms. Seger's nomination has been vindicated in various articles in the financial press covering Governor's Seger's public appearances. For example, an article in the October 20, 1984 American Banker had this to say:

SEGER'S RESPONSES LEAVE BUSINESSWOMEN LOOKING FOR ANSWERS

What does Martha R. Seger know about banking and the economy and when did she know it?

Speaking to an audience of businesswomen here Friday, President Reagan's controversial nominee for the Federal Reserve Board left many wondering if she was willing to divulge anything of her economic views or, in some cases, if she ever had views on issues. Others said that her understanding of the economy was superficial.

Miss Seger's nomination was approved by the Senate Banking Committee after long and sometimes heated hearings in which her qualifications were questioned repeatedly and some senators felt she had not given enough information about her economic views.

Her nomination was sent to the full Senate for a vote but was not acted upon. During a congressional recess, however, President Reagan used his authority to make appointments during a recess and named her to the Fed. The nomination still must be approved by the full Senate, however.

Miss Seger's formal presentation to the Women's Economic Roundtable this week was a fairly noncontroversial discussion of the history of banking regulation and deregulation. But in the question period that followed, Miss Seger puzzled many and angered some with her reluctance to provide answers.

"She gave a brief history of deregulation, but I don't think the importance of it to business was covered at all," said Nina A. Dinell, treasury of the M&M/Mars division of Mars Inc.

"No one at our table thought she was responsive, and I heard the same comments from people nearby."

"It was the ultimate in nonanswers," added Katherine P. Ordona, a tax manager with Arthur Andersen & Co.

Interviews with more than a dozen others who heard Miss Seger turned up identical responses.

When asked, for example, if regulators should have taken steps earlier to hold down the level of international lending to countries that are now threatening to default, Ms. Seger said, "I don't even pretend to have an answer to that."

Asked to explain statements attributed to her that economic growth in excess of 3.5 percent could be maintained,

Ms. Seger flatly declined to answer, saying she had been invited to talk about deregulation.

"I'll come back another time to discuss that," she said.

When asked whether the incursions of so-called "nonbank banks" into banking should be halted, Ms. Seger did not give her own views.

The Federal Reserve Board has supported legislation to that effect, she said, "and that's my answer."

Miss Seger declined to answer questions posed by reporters afterward, saying, for example, that she had not had time to think about the implications of a gross national product report issued that morning and then telling another reporter that it was not fair to ask questions of her as she was leaving.

Asked if she was uncomfortable with the questions asked, however, she said, "No."

One accounting firm officer, who asked that she not be identified, said afterward, "I was surprised that she didn't have a better overall understanding of finance and the economy."

"I can understand why she was ducking the questions," said one woman who nontheless said she was disappointed in Miss Seager. "She hasn't been confirmed yet, and the election is only a few weeks away."

Another article in the Wall Street Journal for October 17, 1984 suggested that Ms. Seger may have deliberately concealed her extremist supply-side views from the Committee during her confirmation hearing. According to the article:

> Ms. Seger said in an interview that she believes the economy could grow at an inflation-adjusted annual rate of 4 percent to 5 percent over 10 years, and that productivity could grow at 3 percent a year over the same period. Her projections, which are well above those made by most economists, suggest that Ms. Seger is more sympathetic to a supply-side view than here previous public comments indicated. Supply-siders have been pressing the Fed for a looser monetary policy.
>
> Ms. Seger's remarks also coincide with the optimism voiced by President Reagan in his reelection campaign concerning the U.S. economy's ability to confound conventional forecasters.
>
> In her Senate confirmation hearings in June, Ms. Seger sounded more orthodox, at one point describing herself as a "garbage collector" of economic theories who picks up "bits and pieces from different schools." Yesterday, she acknowledged that her opinions hadn't come out at the hearings, but she noted, "I didn't choose the questions."

Despite nearly a year of on-the-job training and being able to draw upon the virtually unlimited resources of the Federal Reserve staff, Ms. Seger's performance during her second confirmation hearing was not measurably better than her first appearance. She dismissed the American Banker report of her failure to respond to

questions from a women's professional group by claiming the questions were too technical and that a substantive reply would have been beyond the understanding of those who are not specialists in banking or finance. One of the questions was whether the bank regulators should have acted earlier to restrain the level of bank lending to countries now in danger of default. Another asked her to explain her view that economic growth in excess of 3.5 percent could be maintained. These hardly seem to be narrow technical questions that can be addressed only the arcane jargon of bankers. Rather, they are the kind of broad public policy issues that a Federal Reserve Board Governor should feel comfortable with in communicating his or her views to a general audience.

E. Flawed selection process for this nominee

The question arises: Why would an obscure academic, of no distinction in her field, with no published research and no record outside of the economics profession that would suggest her suitability for the Federal Reserve Board, be considered for this appointment?

We believe that this nominee was selected for political rather than professional reasons.

The nominee is an active and outspoken member of the Michigan Republican Party with very strong partisan views. She was an ardent supporter of gubernatorial candidate Richard Headlee in 1982. In 1983, she was named chairman of a Michigan Republican women's group which seeks to promote and publicize the Administration's positions on economic equity issues. In 1984, she became a State chairman of the Fund for a Conservative America, founded by New York Republican gubernatorial candidate Lewis Lehrman.

The nominee has continued to demonstrate her partisanship by engaging in a running political battle last spring with other Republican leaders in Michigan over the conduct of the 1982 gubernatorial campaign. In so doing, at a time when she knew that she was under active consideration for the Federal Reserve Board, she has raised questions about her judgment.

In May 1984, Ms. Seger submitted a letter to the editor of the Record Eagle and other Michigan newspapers involving the 1982 Blanchard-Headlee race for Governor of Michigan. The letter was published in early June. Ms. Seger's article specifically mentions the activities, during that campaign, of Helen Milliken, the wife of the former Republican Governor of Michigan, and Elly Peterson, the former GOP state chairman and national vice-chairman. Ms. Seger's outspokenness on political questions is in sharp and puzzling contrast to her ambiguous and hesitant statements in response to questions about economics and mandatory matters.

After reading the Seger letter, Mrs. Peterson was moved to respond, "I am stunned that this woman, who has been appointed to a sensitive job, one requiring calmness of rhetoric, would allow herself to be manipulated into raising an 18-month-old issue with a letter that erred in every paragraph."

Mrs. Milliken and Mrs. Peterson jointly sent a letter to the Committee during these confirmation hearings asking "to be on record concerning the inaccuracies (Ms. Seger's) letter contains." They submitted a list of the errors contained in Ms. Seger's article and, at one point, state that Ms. Seger "outrageously distorts" a position

of the Michigan Women's Assembly, made up of 28 statewide Michigan organizations, including the League of Women Voters, the YWCA, the American Association of University Women, and Business and Professional Women, Mrs. Milliken and Mrs. Peterson assert that "The plan which Ms. Seger so outrageously distorts reflects one recommended by the American Law Institute and American Bar Association. Twenty-five states have already enacted it into law." Other alleged inaccuracies in Ms. Seger's article are also detailed. In responding to questions about the Peterson-Milliken views, Ms. Seger was unable to substantiate her charges, saying only that she would apologize if she could be proved to have been in error.

Equally flagrant, when Ms. Seger was introduced to the press by the President at the White House as his nominee for the Federal Reserve Board, she made a categorical declaration of loyalty to him and to his political program, saying: "I support everything he is doing."

The selection procedure for this nomination reflects its partisan political character. Ms. Seger was first considered for but not nominated to the Federal Home Loan Bank Board. At a later date, her name was forwarded to the White House personnel office, for appointment to the Federal Reserve, and she was interviewed by several junior staff. She was one of only three names forwarded to Treasury and Federal Reserve Board members and to the Chairman of the Banking Committee. At least one of the prospective nominees was disqualified since she was not from an appropriate geographic region of the country.

By her own account, the nominee had a cursory meeting with Treasury officials, including Undersecretary McNamar, and met for perhaps less than half an hour with Treasury Secretary Regan. She discussed little in the way of substance with the Secretary.

The nominee also met with the Vice Chairman of the Federal Reserve Board, Preston Martin. At no time did she meet Federal Reserve Board Chairman Volcker until after her nomination was made official by the White House on May 30.

Perhaps it is only a coincidence that shortly before the 1984 Presidential elections, Governor Seger dissented from the majority opinion on the Federal Open Market Committee and urged a more expansive monetary policy while just after the election she returned to orthodoxy and warned in a speech that high interest rates and the high value of the dollar could not be alleviated by unrestrained money creation.

II. RECESS APPOINTMENT ISSUE

A. Legal background

Article II, Sec. 2, Clause 3 of the Constitution authorizes the President "to fill up all Vacancies that may happen during the Recess of the Senate, by granting commissions which shall expire at the End of their next Session." This provision was adopted by the framers of the Constitution without dissent. Its purpose was to allow the President to administer the government during the long periods of time when the Congress was expected to be in recess.

Indeed, during the first half of the 19th century a typical Congressional session lasted less than six months.

While the intent of the Constitutional fathers was clear, various Attorneys General have issued opinions over the years that invariably expanded the authority of the President at the expense of the Senate. For example, the phrase "vacancies that may happen during the recess of the Senate" is clear on its face. A reasonable reading would lead to the conclusion that the vacancy must first occur during a recess. Nonetheless, Attorneys General have held that a vacancy can occur while the Senate is in session and still be eligible for a recess appointment. (1 Ops. Att'y Gen. 631, 633 (1823)).

Likewise, the meaning of the word "recess" has been stretched in a 1960 Attorney General opinion to include not only the interval between sessions but also temporary adjournments to a date certain within a session. (41 Ops. Att'y Gen. 463, 466 (1960).) This expanded view of the President's authority is clearly at odds with the plain language of the Constitution which limits a recess appointment to the end of the "next session" of the Senate. The language of Article II taken as a whole contemplates that a "recess" would be immediately followed by the "next session" of the Senate during which time the Senate would have an opportunity to formally receive the nomination and accept or reject it through its normal processes. It is obvious then, that the term "recess" refers to the recess between sessions and not to a temporary adjournment within a session.

At the very least, consistency requires that an expanded definition of the word "recess" be accompanied by a comparable expansion of the word "session". That is, if a "recess" is to be construed broadly to include intra-session adjournments, then "next session" should also be broadly construed to include the period starting when the Senate returns from a recess up to its next recess. While the terms "recess" and "session" may be stretched, expanding both terms would at least be consistent with the scheme envisioned by the Constitution whereby a recess appointment would not endure beyond the next available period for consideration by the Senate.

Nevertheless, the 1960 Attorney General opinion expanding the definition of "recess" also construes "session" narrowly to mean the period terminated only by a sine die adjournment. Thus every key word of the Constitutional recess appointment authority has been systematically construed by the Attorney General, either narrowly or broadly as the case may be, so as to maximize the authority of the President while minimizing the authority of the Senate. The only consistent thread underlying all these opinions is an expansion of Presidential power.

B. Limitations on recess appointments

At various times, the Congress has attempted to limit the Presient's recess appointment authority. In 1863, it passed a law restricting the pay of recess appointees until confirmed if the vacancy first arose while the Senate was in session. (12 Stat. 646 (1863).) This was obviously an effort by the Congress to return the recess appointment authority to the plain meaning of the Constitution. The 1863 pay law was liberalized in 1940 in response to complaints

that a hardship was being inflicted on recess appointees who could not be paid until they were confirmed. The 1940 amendments (54 Stat. 751; 5 U.S.C. 5503) allowed recess appointees to be paid even though the vacancy first occurred during a session of the Senate if "at the time of the termination of the Senate, a nomination for such office . . . was pending before the Senate."

Having construed the word "session" narrowly in interpreting the language of the Constitution, one might think the Attorney General would give it the same meaning in construing the 1940 pay statute. However, this would allow a recess appointee to be paid only if he or she were appointed at the end of a regular session where the Congress adjourned sine die. Those appointed during temporary adjournments would not be eligible to receive pay.

Accordingly, the same 1960 Attorney General opinion construing "session" narrowly for purposes of the Constitution construed it broadly for purposes of the pay statute! Thus, there are two meanings of the word "session". Under the Constitution, a session can only be terminated by a sine die resolution; under the pay statute, a session can also be terminated by a temporary adjournment to a date certain. The net effect of this convoluted reasoning is to stretch the President's authority almost beyond limit while seriously infringing upon the Senate's Constitutional power to advise and consent on nominations.

A further complication arises with respect to Federal Reserve Board nominees. The 1940 Pay Act states that "no money shall be paid from the Treasury" to any recess appointee who does not meet the law's requirements. These requirements are enforced by a provision included annually in the Treasury, Postal Service and General Appropriations Act to prevent any appropriated funds from being used to pay a recess appointee rejected by the Senate.

The Federal Reserve does not operate on appropriated funds and it could therefore be argued that recess appointees to the Board are not covered by the restrictions in the 1940 Pay Statute or the related prohibitions contained in annual appropriations acts. Indeed, a legal memo from the American Law Division of the Library of Congress reaches this very conclusion. If this interpretation is correct, then Ms. Seger cannot be removed from the Board until the end of 1985 even if the Senate voted 100 to 0 to reject her nomination. Thus the power of the President to make appointments to the Federal Reserve Board without the advise and consent of the Senate could be virtually unlimited.

A debate over the recess appointment authority arose during the Administration of President Eisenhower when he made three recess appointments to the Supreme Court: Earl Warren, William J. Brennan, Jr., and Potter Stewart. All three joined the Court and participated in decisions before they were ultimately confirmed by the Senate. Constitutional scholars were concerned that recess appointments to the Supreme Court were a threat to judicial independence. They were concerned that if a President didn't like a decision rendered by a recess appointee, he could withdraw the nomination; likewise, the Senate could reject a nominee whose opinion it found objectionable. In either case, the independence of the judi-

ciary could be seriously compromised by the recess appointment process.

These dangers led Senator Phil Hart to introduce a sense of the Senate resolution in 1960 discouraging recess appointments to the Supreme Court. The resolution passed by a vote of 48 to 37. We believe its reasoning is equally applicable to the Federal Reserve Board and highly relevant to the Seger nomination and we cite its operative provisions:

> *Resolved*, That it is the sense of the Senate that the making of recess appointments to the Supreme Court of the United States may not be wholly consistent with the best interests of the Supreme Court, the nominee who may be involved, the litigants before the Court, nor indeed the people of the United States, and that such appointments, therefore, should not be made except under unusual circumstances and for the purpose of preventing or ending a demonstrable breakdown in the administration of the Court's business." (106 Cong. Rec. 18145 (1960)).

C. Seger recess appointment

The facts of the Seger recess appointment are simple. Her nomination was submitted to the Senate on June 4, 1984 and referred to the Committee on Banking, Housing and Urban Affairs. The Committee held four days of hearings on June 19, 20, 21 and 22. The Committee then met on June 28 and ordered her nomination reported to the Senate on a straight party-line vote of 10 to 8. The next day, a Friday, the Senate adjourned for three weeks for the July 4 holiday recess and the Democratic National Convention. The following Monday, July 2, the White House announced that the President had given Ms. Seger a recess appointment. There was no official explanation for his action.

The Board of Governors of the Federal Reserve System consists of seven governors appointed with the advice and consent of the Senate. However, many of the key monetary policy decisions are made by the Federal Open Market Committee (FOMC) which includes the seven Governors and the Presidents of the 12 Federal District Banks, five of whom have voting powers on a rotating basis. The next meeting of the FOMC had been scheduled for July 17.

There was no emergency on the Board or the FOMC that required Ms. Seger's immediate recess appointment. Eleven of the twelve voting members of the FOMC were available to decide the course of monetary policy. Federal Reserve Board Chairman Volcker has testified that he did not request a recess appointment and that from the standpoint of the Federal Reserve System, he saw no operational need to have the vacancy on the Board immediately filled.

Moreover, under the Constitution, the President has no authority over the Federal Reserve Board other than his statutory appointment power provided to him by the Federal Reserve Act. The power to conduct monetary policy is based on the money clause under Article I, Sec. 8 of the Constitution and is exclusively a power of the Congress. In passing the Federal Reserve Act in 1913,

the Congress delegated to its chosen agent, the Federal Reserve, its monetary powers to be carried out independent of the President and the Executive branch.

Thus there was no demonstrable emergency or operational difficulty or Presidential responsibility that can be cited as justification for the extraordinary action taken by the President on July 2, 1984 in giving Ms. Seger a recess appointment to the Federal Reserve Board.

D. Issues raised by the recess appointment

We believe the President has clearly abused his authority in giving a recess appointment to Ms. Seger. Those who profess to see nothing improper in the President's actions cite examples where previous Presidents have made intra-session recess appointments when the recess period was even less than the 23-day recess during which Ms. Seger was appointed. The apologists for the President would have us believe that the only issue is a narrow legal question involving the minimum number of days needed to qualify as a "recess" for recess appointment purposes. And since other Presidents have made recess appointments during even shorter recesses, the majority report last year concluded the President was "justified and well within his constitutional and legal discretion" in making the Seger recess appointment. It should be emphasized that none of these "precedents" involved a controversial nomination barely reported out of Committee for a 14-year term to an agency independent of the President.

We are not prepared to concede that the President acted within the limits of his legal discretion since much of the convoluted reasoning defining what is a "recess" or "session" or when a vacancy "happens" stems from the opinions of various Attorneys General and has never been definitively tested in the Supreme Court. Nonetheless, our purpose is not to debate the narrow legal issue but rather the substance of the President's action and whether it is in keeping with the Constitutional prerogatives of the Senate. We are dismayed that the majority report speaks only to the Constitutional rights of the President and says virtually nothing about the constitutional rights of the Senate. We had hoped that the majority party would be able to transcend narrow partisanship and uphold the institutional role of the Senate which is the job of any majority party regardless of who happens to be President.

Under our form of government, power is divided among three coequal branches and exercised under an extensive system of checks and balances. Inevitably, there is a certain degree of tension as each branch seeks to test from time the outer limits of its Constitutional authority. At the same time, the system has managed to survive for nearly 200 years because each branch has shown a spirit of accommodation and respect for the prerogatives of the other two. Without this rule of reason, we would have had a Constitutional breakdown years ago.

There is evidence that President Reagan neither understands nor appreciates the genius of our delicate system of checks and balances. He has shown a pervasive disregard for the Constitutional preogatives of the Congress. In 1984, he set a modern-day record for the number of recess appointments, both intra- and inter-ses-

sion, going back to the administration of Franklin D. Roosevelt. He has also made more extensive use of the legally suspect intra-session recess appointments than any President in recent history. The details of these appointments may be found in the studies prepared by the Library of Congress and included in the Committee's hearing record.

We believe the President's use of his recess appointment authority cannot be measured against a narrowly legalistic test; it must be measured instead against the essential purpose for its inclusion in the Constitution. Clearly, the recess appointment authority is an exception to the more general authority of the Senate to advise and consent on nominations. The exception can only be justified when necessary to enable the President to discharge his administrative responsibilities when the Senate is not in session. It is not a open-ended authority to be used in an arbitrary or capricious manner by a President bent on achieving some partisan political advantage.

When measured against this standard, what possible justification can there be for the Seger recess appointment? The President has no legal or Constitutional responsibility for monetary policy and the chief official charged with that responsibility has testified he did not ask and did not need the recess appointment. The Senate was proceeding with deliberate speed in acting on the nomination. It had been reported out of Committee by a close vote with every expectation that it would be vigorously debated when the Senate returned in July.

The essential character of that debate was fundamentally changed by the recess appointment. The opponents of the nomination were effectively denied a fair opportunity to present their case to the full Senate that Ms. Seger should not be confirmed. Once she bacame a sitting Governor the opponents of the nomination had a much greater burden of proof. Instead of demonstrating that a prospective nominee should not be seated, they had to convince their colleagues that a sitting Governor should be unseated.

As every member of the Senate knows, there is a built-in advantage afforded by incumbency that tends to increase with time. Most members of the Senate are reluctant to unseat an official already in office except for the most compelling reasons. Thus the Parlimentary dynamics between the majority and minority parties were decisively changed by the President's recess appointment of Ms. Seger. Suddenly, the supporters of the Seger nomination were no longer under any immediate pressure to convince the Senate of her qualifications. She had already been installed for a term lasting up to 18 months and their case for the nomination could only become stronger with the passage of time. Indeed, the Committee vote for Ms. Seger this year was 11 to 4 compared to 10 to 8 last year.

No one knows for sure what would have happened had the Senate debated the Seger nomination last July without the recess appointment. Perhaps she would have been approved anyway. But the important point is that the President of the United States deliberately and flagrantly misused his recess appointment authority in order to influence the advice and consent process of the United States Senate. By giving Ms. Seger the recess appointment, the President immeasurably strengthened the hand of the majority

party in its contest with the minority party over the Seger nomination.

There are some in the majority party who may applaud the President's actions. That is a short-sighted view. Precedents are being created that will one day come back to haunt the members of the majority party when the shoe is inevitably on the other foot. The majority and minority parties are perfectly capable of working out their disagreements within the customs and rules of the Senate without Presidential intervention. The Senate as an institution can only be weakened by allowing the President to intervene in our own internal processes.

Another effect of the recess appointment is to give the President absolute control over one of the seven members of the Federal Reserve Board in violaton of the Federal Reserve Act and the money clause of the Constitution which assigns the money power exclusively to the Congress. In the nearly 11 months she has been on the Board, Ms. Seger has in effect served at the pleasure of the President. Until she is confirmed by the Senate, her nomination can be withdrawn at any time by the President for any reason whatsoever. The other six members of the Board have terms fixed by statute and can be removed only for cause. These members can cast their votes on monetary policy independent of any political pressure while Ms. Seger has been totally beholden to the President of the United States. The President has been able to achieve a power over monetary policy that has been otherwise denied to him by the Constitution and the Federal Reserve Act.

The Seger nomination is for a 14-year term ending in 1998—almost to the start of the next century. Moreover, she has indicated she intends to serve out her full term. If confirmed, she will be making monetary policy decisions not only for the balance of President Reagan's second term but during the succeeding two or three administrations as well.

We believe it is time for the Senate to take seriously its advice and consent responsibilities under the Constitution. The Senate should reject the Seger nomination because she lacks the basic qualifications to be a Federal Reserve Board Governor and because the Senate needs to send a strong signal to the President that it does not tolerate the unwarranted use of the President's recess appointment authority.

WILLIAM PROXMIRE.
PAUL S. SARBANES.
JIM SASSER.
ALAN CRANSTON.

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